UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-40588
Summary Calendar

VIRGINIA MARABLE,

Plaintiff-Appellant,

versus

FRANKLIN COUNTY, TEXAS, ET AL.,

Defendants,

UPSHUR COUNTY, TEXAS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas

(6:92 CV 36)

(July 3, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

In 1990, Marable was convicted by a state court in Franklin County, Texas, along with her husband and her 28-year old daughter,

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

of aggravated possession of marijuana. Marable was sentenced to 30 years of imprisonment; however, her conviction eventually was reversed and she was later acquitted. See Marable v. State, 802 S.W.2d 7 (Tex. Ct. App. 1990). In January 1992, Virginia Marable filed a civil rights complaint against Upshur County, Texas, the sheriff of Upshur County, R. D. Cross, and others, alleging deliberate indifference to her serious medical needs during her initial incarceration in 1990. Marable's claims against Sheriff Cross and Upshur County proceeded to trial.[1] The jury returned a verdict in favor of the defendants, and Marable brought this timely appeal, challenging the judgment against her on several grounds.

FACTS

After her sentencing on February 1, 1990, Marable and her daughter were transferred from the Franklin County Jail to the Upshur County Jail. Upshur County agreed to house Franklin County's inmates for a daily charge; however, Franklin County remained responsible for any medical expenses incurred by the transferred prisoners.

Prior to being sentenced, Marable experienced nausea, diarrhea, and abdominal cramps which she attributed to food poisoning or nervousness. Upon being transferred to Upshur County, Marable reported to jail officials that she had been running a fever for a few days.[2] Marable testified at trial that she asked

[1] Marable settled with Franklin County and its sheriff for $50,000.

[2] Marable's temperature was not documented. The jail did not have a thermometer.

to see a doctor and filled out a form requesting such. Marable also testified that she requested to see a doctor on the following day, a Friday, but was informed that "it was not customary to ask for a doctor as you approached the weekend" and she "might inquire again at the earliest on the next Monday." Marable's daughter corroborated Marable's assertions that she had requested a doctor on several occasions, and the daughter also testified that she requested a doctor for her mother five times. However, none of the jail personnel who testified remembered any such request by Marable or her daughter.

On the following Monday, Marable was transferred to an observation cell, the first stage of medical care at Upshur County. She was returned to her cell shortly thereafter. On the following Thursday, Marable was visited by her attorney. According to the attorney, Marable had a "yellowish, grayish look" and was stooped over and gripping her stomach. The attorney also testified that Marable told him that she had requested a doctor. The attorney went to see the sheriff of Franklin County and asked him to "check on Upshur County or something to get this woman some treatment."

Marable saw a doctor on Friday, February 9, 1990. The doctor quickly concluded that Marable had appendicitis and needed a surgeon. Marable was returned to the Upshur County Jail for an hour, and then was transferred to a hospital one hour away. After three or four days, Marable was transferred to another hospital, where she underwent surgery.

The medical records confirmed that Marable had appendicitis and a ruptured appendix. In addition, an abscess had formed around the ruptured appendix. Testimony adduced at trial established that a ruptured appendix can be fatal.

The jail personnel testified that they gave Marable Tylenol, Immodium, saltine crackers, and tea. Their testimony was that, although they knew that Marable was not well, they did not know that she was seriously ill. One jailer testified that he thought Marable had "jailitis" resulting from having just received a 30-year prison sentence.

Sheriff Cross testified that there was no in-house doctor, nurse, or trained medical professional at the jail when Marable was incarcerated there, but they had a "doctor on call" four blocks away from the jail. He stated that it was up to the jailers to use their discretion to determine whether an inmate needed medical attention. He further testified that the first step in determining whether an inmate needs medical attention is for the jailers to move them into the observation cell. Cross acknowledged that his failure to have a licensed physician as director of medical services was in violation of the Texas Commission on Jail Standards. However, he testified that the jail was checked yearly by the commission and that the commission certified the jail prior to Marable's admission.

OPINION

Marable argues that the district court erred by not granting her motion for a judgment as a matter of law. She argues that

Upshur County's policy of allowing jailers without medical training to assess her medical condition amounted to deliberate indifference to her serious medical needs. She concedes that Sheriff Cross's testimony at trial "is probably technically sufficient to permit [him] to escape liability for showing deliberate indifference to [her] specific medical need." She argues, however, that Sheriff Cross is liable for failing to provide jailers with medical training and allowing untrained jailers to exercise their discretion over whether prisoners should receive medical care.

In reviewing a district court's disposition of a motion for a judgment as a matter of law, this court applies the same test as did the district court, without any deference to its decision. Portis v. First Nat'l Bank of New Albany, Miss., 34 F.3d 325, 327 (5th Cir. 1994). This court should consider all of the evidence and reasonable inferences in the light most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at a contrary verdict, granting the motion is proper. However, if there is substantial evidence of such quality and weight that reasonable jurors, in the exercise of impartial judgment, might reach differing conclusions, the motion should be denied.

To establish municipal or county liability under § 1983, a plaintiff must demonstrate a policy or custom which caused the constitutional violation. Richardson v. Oldham County, Texas, 12 F.3d 1373, 1381 (5th Cir. 1994). Under Texas law, the county

sheriff acts as a policymaker for the county. Turner v. Upton County, Texas, 915 F.2d 133, 136 (5th Cir. 1990), cert. denied, 498 U.S. 1069 (1991).

In order to prove that Upshur County's policy of inadequate training violated her rights under § 1983, Marable must show that the policy was inadequate and that Sheriff Cross was deliberately indifferent in its implementation. See Benavides v. County of Wilson, 955 F.2d 968, 972 (5th Cir. 1992)(jailers failed to summon medical assistance while inmate remained paralyzed for 18 hours)(citing City of Canton, Ohio v. Harris, 489 U.S. 378, 388 (1989)), cert. denied, 113 S. Ct. 79 (1992). Thus, Marable must show that Cross's failure to provide training was an intentional choice, not merely an unintentional negligent oversight. Evans v. City of Marlin, Tex., 986 F.2d 104, 108 (5th Cir. 1993). In addition, she must show that the deficiency in training "directly caused" her injury. Benavides, 955 F.2d at 972. Supervisory liability exists against Sheriff Cross if it is shown that he implemented a policy so deficient that it amounted to a "repudiation of constitutional rights" and was "the moving force of the constitutional violation." Thompkins v. Belt, 828 F.2d 298, 304 (5th Cir. 1987)(internal quotations and citations omitted).

In Farmer v. Brennan, 114 S. Ct. 1970, 1979-80 (1994), the Supreme Court defined "deliberate indifference" under the Eighth Amendment. The Court stated that a defendant could not be found liable in such a context unless it knew of and disregarded an excessive risk to inmate health or safety; the defendant must both

be aware of facts from which the inference could be drawn, and it must also draw the inference. Id. at 1979. However, under some circumstances, the defendant's knowledge of a substantial risk of harm may be inferred by the obviousness of the risk. Id. at 1981-83. Thus, the narrow issue is whether no reasonable juror could have concluded that Sheriff Cross did not subjectively know that his policy regarding the assessment of the inmates' medical needs posed an excessive risk to inmate health or safety, or that the obviousness of the risk was not such that Cross's knowledge of a substantial risk should have been inferred. See id.; Portis, 34 F.3d at 327.

Marable argues that the obviousness of the risk was such that Sheriff Cross's knowledge should have been inferred.[3] She asserts that it was "uncontradicted" at trial that permitting jailers, regardless of medical training, to assess inmates's medical needs, would "inevitably result" in an excessive risk to inmate health and safety. However, her assertion is based only on her medical expert's testimony of such. Further, the question whether Sheriff Cross knew that his policy presented a substantial risk from "the very fact that the risk was obvious" was a question for the factfinder. See Farmer, 114 S. Ct. at 1981 (also noting that factors for determining whether a risk is obvious include whether it is longstanding, pervasive, and well-documented). Marable

[3] The defendants argue that Marable misinterprets Farmer to require an objective standard of knowledge. However, a closer reading of Marable's argument suggests that she seeks to apply the exception to Farmer wherein knowledge may be inferred.

introduced no testimony suggesting that Upshur County's policies varied grossly from that of other county jails. Nor did she introduce testimony suggesting that the risk was longstanding, pervasive, or well-documented.

Taking all inferences in the light most favorable to the defendants, a reasonable juror could have determined that Sheriff Cross did not know that his policy of allowing untrained jailers to assess inmates' medical conditions presented an excessive risk to the health and safety of the inmates. See id. at 1979. In addition, a reasonable juror could have determined that the obviousness of the risk was not such that Cross's knowledge may be inferred. Id. at 1981. Insofar as Marable alleged a policy of allowing jailers to reject an inmate's request to see a doctor, the jury was free to accept the jailer's testimony that Marable did not request a doctor and to reject conflicting testimony. Because reasonable minds could have differed, the district court did not err by not granting Marable's motion for a judgment as a matter of law. See Portis, 34 F.3d at 327.

Marable also argues that the district court erred by overruling her motion in limine, thereby permitting the defendants to reveal during trial the nature of her conviction, the length of her sentence, and related convictions involving her daughter and husband. She concedes that the fact of her conviction was necessary to explain her presence in the Upshur County Jail, but argues that the defendants should not have been allowed to "harp" on the egregious nature of her conviction. Marable notes instances

during opening statements, the testimony of witnesses, and closing statements, wherein the defendants referred to her family as "marijuana growers" and revealed that her conviction had been for aggravated possession of marijuana and that she had been given a lengthy prison sentence.

A district court's evidentiary rulings are reviewed for an abuse of discretion. Johnson v. Ford Motor Co., 988 F.2d 573, 578 (5th Cir. 1993). Improper comments by an opponent's attorney during trial do not warrant a new trial unless this court concludes that a manifest injustice would result by allowing the verdict to stand.

Under Fed. R. Evid. 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. See Fed. R. Evid. 403; Johnson, 988 F.2d 577. "The standard for relevance is a liberal one." E.E.O.C. v. Manville Sales Corp., 27 F.3d 1089, 1093 (5th Cir. 1994), cert. denied, 115 S. Ct. 1252 (1995). It is evidence "`having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.'" Id. (quoting Fed. R. Evid. 401).

The defendants argue that the nature of Marable's conviction "would necessarily factor into the jailor's subjective belief that Marable was suffering from `jailitis.'" Thus, they argue, the

evidence was relevant to a determination whether the jailers were deliberately indifferent to her serious medical needs.[4]

Given the liberal nature of the definition of relevant evidence, the district court could conclude that the nature of Marable's conviction and the length of her sentence was relevant. See Manville, 27 F.3d at 1093. However, the probative value of the evidence is questionable because Marable's suit was based on the reasonableness of the County's policy regarding the assessment of prisoner medical conditions. Thus, the jailer's subjective beliefs concerning Marable's physical complaints was not the central issue at the trial. Moreover, it is arguable that any form of incarceration might result in "jailitis," regardless of the nature of the charges, or the length of the sentence.

Nevertheless, the prejudicial effect of the evidence did not substantially outweigh its probative value. See Johnson, 988 F.2d at 577. First, Marable concedes that the jury was required to know the fact of her conviction in order to explain her presence in the Upshur County Jail. Second, it was revealed at trial that Marable was later acquitted of the crime for lack of evidence, with Marable's attorney testifying that it was the first time in his

[4] On appeal, the defendants argue that the "unique circumstances" of Marable's conviction were relevant to show why the jailers could recall Marable and the events surrounding her incarceration four years earlier. They also argue that, given Marable's assertion of mental anguish, it would be impossible to separate the anguish flowing from the conviction and sentence from the anguish that flowed from Marable's experience in the Upshur County jail. The defendants did not make these arguments in the district court; therefore, the court could not have considered them in weighing the probative value or the prejudicial effect of the evidence. Thus, we do not consider them now.

considerable experience that a defendant's conviction was not merely reversed, but the appellate court rendered an acquittal. Finally, although Marable characterizes the nature of her crime as egregious, it was not inflammatory. If the jury was not informed of the nature of Marable's crime, it might have theorized that she were convicted of a violent or more egregious crime. The district court did not abuse its discretion by admitting the evidence. Johnson, 988 F.2d at 578. For the same reasons, the defendants' comments that Marable and her family were "marijuana growers," although improper, would not result in a manifest injustice if the verdict were allowed to stand. Id. at 582.

Marable also suggests that the district court's failure to make an on-the-record balancing warrants a possible remand so that it can be determined whether the prejudicial effect of the statements outweighed their probative value. She cites United States v. Zabaneh, 837 F.2d 1249, 1264-65 (5th Cir. 1988), in which this court discussed the necessity of on-the-record findings under the Beechum[5] analysis. Id.

The defendants question whether Beechum is applicable in this civil context. See also Smith v. State Farm Fire and Cas. Co., 633 F.2d 401, 403 (5th Cir. 1980)(accepting, "for purposes of [that] appeal without analysis or decision," the contention that Beechum was applicable). However, even assuming that Beechum's balancing requirement is applicable, on-the-record findings are not required

[5] United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978)(en banc).

unless they are requested by a party. See United States v. Maceo, 947 F.2d 1191, 1199 n.3 (5th Cir. 1991), cert. denied, 503 U.S. 949 (1992). Because Marable made no such request, this argument is without merit.

Marable next argues that the district court unnecessarily restricted cross-examination of the defendants' medical expert. Each time Marable questioned the expert about who should assess a prisoner's medical condition, the defendants objected and the district court sustained the objection. Marable argues that Fed. R. Evid. 705 allows liberal cross-examination of an opposing expert's underlying opinions and that the district court's determination that her cross-examination involved questions of law was erroneous.

"[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a). Rule 704 does not, however, open the door to all opinions and a witness may not give legal conclusions. Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983). In deciding whether an expert's opinion should be admitted, the court should focus on Fed. R. Evid. 702's standard of whether the opinion will assist the trier of fact to understand the evidence or to determine a fact in issue. Salas v. Carpenter, 980 F.2d 299, 305 (5th Cir. 1992). Thus, the evidence should bring to the jury "more than the lawyers can offer in argument." Id. (internal citation omitted).

It is arguable that the testimony solicited by Marable would not have been a legal conclusion. Under Farmer, the determination of whether the County's policy amounted to deliberate indifference turns on subjective rather than objective components. See Farmer, 114 S. Ct. at 1979-80. Thus, although the issue of whether the County's policy should not have been implemented is relevant in determining the "obvious risk" component of Farmer, 114 S. Ct. at 1981-83, it was not a legal conclusion.

However, the cross-examination that Marable sought would not have established that Sheriff Cross was, as a subjective matter, deliberately indifferent. Further, Marable was able to convey to the jury her contention that the jailers should not have been permitted to assess prisoner's medical conditions by introducing specific facts regarding how the jailers responded to her appendicitis. Thus, the exclusion of the testimony will be viewed as harmless error. See Arcement v. Southern Pac. Transp. Co., 517 F.2d 729, 732 (5th cir. 1975)(exclusion of testimony pursuant to Rule 704 amounted to harmless error).

Marable also makes two arguments concerning the district court's jury instructions. First, she argues that the jury charge erroneously required her to prove the unnecessary and wanton infliction of harm. Second, she challenges the court's instruction on the "policy" of the defendants. Marable properly preserved her allegations of error for appeal by lodging a timely objection to the instructions. See Fed. R. Civ. P. 51.

Trial judges normally are accorded wide latitude in fashioning jury instructions. Palmer v. Lares, 42 F.3d 975, 978 (5th Cir. 1995). Reversal is appropriate only if the charge, taken as a whole, leaves this court with substantial doubt whether the jury was properly guided on the applicable law in its deliberations. Id. This court will not reverse if it finds that the challenged instruction could not have affected the outcome of the case.

Marable first argues that the jury charge erroneously required her to prove that the defendants "unnecessarily and wantonly inflicted harm," because "there is no authority" for the "unexplained language[.]". She argues that the language implies a tougher burden than the deliberate indifference test that was refined in Farmer, 114 S. Ct. at 1979. Id.

In Farmer, the Supreme Court noted that the requirement that the prison official have a sufficiently culpable state of mind resulted from the principle that "`only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.'" Farmer, 114 S. Ct. at 1977 (citing Wilson v. Seiter, 501 U.S. 294, 297 (1991)). Recently, this court reiterated that deliberate indifference constitutes the "unnecessary and wanton infliction of pain." See Reeves v. Collins, 27 F.3d 174, 176 (5th Cir. 1994)(Eighth Amendment claim based on prison official's failure to recognize that prisoner had hernia). Thus, Marable's argument is without merit.

Marable also argues that the jury charge erroneously submitted to the jury the question of whether the defendants' actions were pursuant to a policy when such already had been established. She argues that the district court compounded its error by refusing to properly instruct the jury on what constitutes a "policy."

The jury interrogatory queried:

> Do you find from a preponderance of the evidence that Upshur County maintained a policy that resulted in a deliberate indifference to the serious needs of Virginia Marable and that such policy, if any, was a proximate cause of the injuries, if any, suffered by Virginia Marable?

Although Sheriff Cross testified that it was his policy to allow the jailers to assess inmates' medical conditions and that the jail had a doctor four blocks away, Cross did not testify that his policy resulted in deliberate indifference or was the proximate cause of Marable's injury. The uncontradicted testimony shows what Cross's policy was, and the dispute involved causation and Cross's state of mind. Thus, any error in the instruction could not have affected the outcome of the case. See Palmer, 42 F.3d at 978.

Nor has Marable shown that the district court erred by denying her proposed instructions. Marable's first request, that the jury be instructed that a policy can be established by a single act or omission, is an incorrect statement of the law. Although a single application of a policy which causes a constitutional violation can result in liability, failure-to-train cases require more than a single instance of injury before municipal liability can attach. Brown v. Bryan County, Ok., Bd. of County Comm'rs of Bryan County,

Ok., ___ F.3d ___ (5th Cir. Jun. 2, 1995)(No. 93-5376) 1995 WL 298984 at *8-9, *14.

Marable's second and third requested instructions, that a policy can be established by the failure to train, supervise, or reprimand a jailer, was overly specific and unnecessary because the jury was instructed generally that it must find that "one or more Upshur County jailers displayed deliberate indifference to an illness of the plaintiff pursuant to a policy or custom of Upshur County." Given the trial testimony, the jury easily could have extrapolated that the policy at issue was the failure to train or supervise. Thus, the jury was not misguided in its application of the law. See Palmer, 42 F.3d at 978.

Marable's final argument is that the defendants were permitted to call three "surprise" witnesses. She argues that the witnesses were allowed to testify although the defendants had not provided an adequate summation of their testimony as required by the Civil Justice Expense and Delay Reduction Plan of the Eastern District of Texas.

Two of the witnesses were Upshur County jailers at the time Marable was incarcerated. Both were listed on the defendants' witness list and on the joint pretrial order. The third witness, the registrar of Texas Women's University, was not listed by the defendants, but Marable apparently speculated that the witness would testify because she filed a motion to strike such testimony, should it be offered. Thus, none of the witnesses were truly "surprise" witnesses. Given these facts, the district court did

not abuse its discretion in allowing the witnesses to testify. Esposito v. Davis, 47 F.3d 164, 168 (5th Cir. 1995)("[I]t almost goes without saying that this type of decision is within the sound discretion of the district court.").

AFFIRMED.